

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LUCY RODRIGUEZ, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

INSTAGRAM, LLC, a Delaware LLC,

Defendant.

No. C 12-06482 WHA

**ORDER DISMISSING ACTION
AND DENYING MOTION FOR
LEAVE TO FILE SECOND
AMENDED COMPLAINT**

INTRODUCTION

Plaintiff, a California resident, filed a complaint and then an amended complaint seeking to represent a consumer class of California plaintiffs, alleging subject-matter jurisdiction under the Class Action Fairness Act. Defendant moved to dismiss for lack of Article III standing and for failure to state a claim under Rule 12(b)(6). Prior to ruling on the motion to dismiss, plaintiff was given an opportunity to show facts establishing federal subject-matter jurisdiction under CAFA. Plaintiff has also filed a motion seeking leave to file a second amended complaint. For the reasons stated below, there is no federal subject-matter jurisdiction, leave to amend is **DENIED**, and the action is **DISMISSED**.

STATEMENT

This civil action arises out of an announcement by defendant Instagram, LLC that its terms of use would be modified. Instagram is a web-based photograph- and video-sharing

1 platform through which users host and share user-generated content. Instagram provides an
2 application for mobile devices that allows users to upload photos, apply digital filters to those
3 photos, and share them with others on Instagram and other social networking websites like
4 Twitter and Facebook. Over 100 million users subscribe to Instagram's service. Individuals
5 who use Instagram must agree to Instagram's terms of use. At issue is Instagram's changed
6 terms of use, announced in December 2012 and made effective as of January 19, 2013.

7 Instagram modified the terms of use pursuant to the change-of-terms provision in the
8 prior terms of use, which stated (Amd. Compl. Exh. A at 23):

9 We reserve the right to alter these Terms of Use at any time. If the
10 alterations constitute a material change to the Terms of Use, we
11 will notify you via internet mail according to the preference
12 expressed on your account. What constitutes a "material change"
13 will be determined at our sole discretion, in good faith and using
14 common sense and reasonable judgment.

15 The new terms of use included an arbitration agreement, from which plaintiff could and
16 did opt out. The new terms also modified the license Instagram claimed over users' pictures and
17 other user-generated content. The terms stated: "if you do not agree to be bound by all of these
18 Terms of Use, do not access or use the Service" (Amd. Compl. Exh. B at 32). Included in the
19 new terms of use were instructions on deactivating an account, which included a hyperlink and
20 web address to access a deactivation form (*id.* at 33). Unlike the prior terms of use, which
21 contained no choice-of-law provision, the new terms of use included a choice-of-law provision
22 selecting California law (*ibid.*).

23 A different plaintiff filed the original complaint herein on December 21, 2012, which
24 defendant moved to dismiss. On March 6, 2013, the parties stipulated to file a first amended
25 complaint substituting Lucy Rodriguez as plaintiff. It alleges that "at all times relevant hereto,
26 [p]laintiff maintained an active account with Instagram to which [p]laintiff has uploaded
27 pictures" (Amd. Compl. ¶ 13). Plaintiff did not cancel her Instagram account prior to January
28 18, 2013, the date the new terms of use became effective. The first amended complaint asserts
federal subject-matter jurisdiction under the Class Action Fairness Act. *See* 28 U.S.C.
1332(d)(2). The pleading includes claims for breach of contract, violation of Section 17200 of

the California Business and Professions Code, promissory estoppel, and declaratory and injunctive relief, all based on state law.

Defendant filed a second motion to dismiss, contending lack of subject-matter jurisdiction due to absence of injury-in-fact under Article III. Before the hearing on the motion to dismiss, the Court requested supplemental briefing on whether federal subject-matter jurisdiction was lacking under CAFA. Plaintiff was also required to submit admissible proof of minimal diversity under CAFA. In addressing CAFA jurisdiction, plaintiff now moves for leave to file yet another complaint. The proposed pleading would remove the claim for promissory estoppel and seek relief on behalf of a putative *nationwide* class (as well as a California sub-class) but otherwise would track the operative pleading. Defendant opposes the amendment.

As to the first amended complaint, the operative pleading, this order must decline to exercise jurisdiction based on the “home-state controversy” exception to CAFA. This order also determines that leave to amend should not be granted since, among other things, the sole purpose of the amendment would be to contrive federal subject-matter jurisdiction.

ANALYSIS

In order to establish federal subject-matter jurisdiction under CAFA, a plaintiff must demonstrate (1) that the amount-in-controversy exceeds five million dollars and (2) that the parties are “minimally diverse.” For the latter, Section 1332(d)(2) requires:

1. Any member of a class of plaintiffs is a citizen of a State different from any defendant;
2. Any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
3. Any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or citizen or subject of a foreign state.

The operative pleading asserts a class of California residents. One question recently raised was whether such a class could satisfy the minimal diversity threshold. The submission by plaintiff shows such minimal diversity. The problem is not minimal diversity but the exception for home-state controversies, to which this order now turns.

1 **1. THE HOME-STATE CONTROVERSY EXCEPTION.**

2 District courts “shall decline to exercise jurisdiction” under Section 1332(d)(2) where
3 “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the
4 primary defendants, are citizens of the State in which the action was originally filed.” This is
5 known as the home-state controversy exception to CAFA. The first amended complaint, now the
6 operative complaint, asserts a California class as follows (Amd. Compl. ¶ 30) (emphasis added):

7 All *residents* of the State of California, who created an Instagram
8 account prior to December 18, 2012, and posted at least one
9 picture to Instagram prior to December 18, 2012.

10 The home-state controversy exception plainly applies. Citizenship is determined by state
11 of domicile, not state of residence. An individual is domiciled “where he or she has established
12 a fixed habitation or abode in a particular place, and [intends] to remain there permanently or
13 indefinitely.” *Lew v. Moss*, 797 F.2d 747, 749–50 (9th Cir. 1986) (quoting *Owens v. Hunting*,
14 115 F.3d 814, 819 (9th Cir. 1986)). “Residence is physical, whereas domicile is generally a
15 compound of physical presence plus an intention to make a certain definite place one’s
16 permanent abode.” *Weible v. United States*, 244 F.2d 158, 163 (9th Cir. 1957).

17 Once federal jurisdiction has been established under CAFA, “the objecting party bears
18 the burden of proof as to the applicability of any express statutory exception under [Section]
19 1332(d)(4)(A) and (B).” *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007).

20 This order finds that a consumer class defined as California residents is, by and large,
21 a class of California domiciles and that the aberrated case wherein a California resident is
22 domiciled elsewhere is so rare as to fall far short of the one-third needed to defeat the exception.
23 The aberrated case could be, for example, a soldier stationed in California (and thus a resident)
24 but whose domicile is New Mexico. Yes, there will be some of those but they will be few and
25 far between. The idea that at least one-third of all California residents claim a domicile
26 elsewhere is fanciful. This order holds that for a class of consumers residing in California, at
27 least two out of three are also California citizens.

28 Other district courts have held that where plaintiff’s own characterizations demonstrate
the action’s local nature, no further discovery or proof is necessary. *See, e.g., Elsea v. Jackson*

County, Mo., No. C 10-0620-ODS, 2010 WL 4386538, at *4 (W.D. Mo. Oct. 28, 2010) (Judge Ortrie Smith); *Joseph v. Unitrin, Inc.*, No. C 08-077-MAC, 2008 WL 3822938, at *6 (E.D. Tex. Aug. 12, 2008) (Judge Marcia Crone); *Dunham v. Coffeyville Res., LLC*, No. C 07-1186-JTM, 2007 WL 3283774, at *3 (D. Kan. Nov. 6, 2007) (Judge Thomas Marten); *Mattera v. Clear Channel Commc'ns, Inc.*, 239 F.R.D. 70, 80 (S.D.N.Y. 2006) (Judge Denny Chin). This order holds that the home-state controversy exception applies here; therefore federal subject-matter jurisdiction is absent for the first amended complaint.

2. THE PROPOSED PUTATIVE NATIONWIDE CLASS.

The proposed second amended complaint would skirt around the home-state controversy exception by alleging a nationwide class (yet still asserting California law claims). The proposed pleading would assert a class as follows (Dkt. No. 38 at 17):

All residents of the *United States*, who created an Instagram account prior to December 19, 2012, and posted at least one picture to Instagram prior to December 18, 2012.

Whether to allow leave to amend is within the discretion of the district court. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). Under Rule 15, amendments are usually granted generously in order to allow cases to be decided on the merits. But the amendment in question is not aimed at the merits. Instead it is aimed at contriving subject-matter jurisdiction where none previously existed. The contrived character of the amendment seems plain. It is one thing to apply California law to adjudicate the claims of a California class (this is a normal occurrence) but quite another to apply California law to adjudicate the rights of the residents of the other 49 states. The undersigned judge has worked through this issue in many previous proposed nationwide class actions. When the claims are based on *state* law, as here, the law of fifty states is likely to apply (in absence of a choice-of-law provision) and it is unmanageable. And, a single resident in California with standing to assert California claims is not an adequate representative of residents, say, in Hawaii, who might be better off having their rights adjudicated under their own state law.

While the *new* terms of use include a choice-of-law provision selecting California law, the *old* terms of use — the lynchpin of this action — did not. The putative nationwide class

1 would therefore likely require a choice-of-law analysis for all 50 states and would further
2 necessitate the application of contract law for all 50 states. “[C]ourts routinely deny class
3 certification because plaintiff’s claims would require application of the substantive law of
4 multiple states.” *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 311–12
5 (S.D.N.Y. 2004) (Judge William Pauley). Indeed, the undersigned judge recently denied
6 class certification for this very reason. *Lane v. Wells Fargo Bank, N.A.*, No. C 12-04026, 2013
7 WL 3187410, at *4 (N.D. Cal. June 21, 2013). As such, it would be futile to allow plaintiff to
8 amend to a putative nationwide class where plaintiff’s overreaching will almost certainly be
9 denied at the class certification stage.

10 Finally, plaintiff’s counsel have already had one opportunity to amend. A third try on
11 such a contrived claim fraught with so many Rule 23 problems should be denied.

12 CONCLUSION

13 For the foregoing reasons, plaintiff’s first amended complaint is **DISMISSED** and
14 plaintiff’s motion for leave to file a second amended complaint is **DENIED**. Plaintiff has been
15 given ample opportunity to sufficiently plead. This action is at an end in the district court
16 without prejudice to refile in state court.

17
18 **IT IS SO ORDERED.**

19
20 Dated: July 12, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE